

IN THE SUPREME COURT

Appeal from the Court of Appeal
David H. Sawyer, William B. Murphy, Joel P. Hoekstra

PEOPLE OF THE STATE OF MICHIGAN, SUPREME COURT NO. 121310
PLAINTIFF-APPELLANT, COURT OF APPEALS NO. 235518
V LOWER COURT NO. 99-95646-FH
GERALD LEE BABCOCK,
DEFENDANT-APPELLEE.

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APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION.....	iii
STATEMENT OF QUESTION PRESENTED.....	iv
STATEMENT OF FACTS.....	1-3
ARGUMENT	
INTRODUCTION.....	4
I WHETHER THE JACKSON CIRCUIT COURT SATISFIED THE “SUBSTANTIAL AND COMPELLING REASON” REQUIREMENT OF MCL 769.34(3).....	5-8
II WHETHER THE JACKSON CIRCUIT COURT SATISFIED THE “STATES ON THE RECORD” REQUIREMENT OF MCL 769.34(3)....	9
III THE STANDARD OF APPELLANT REVIEW FOR THE COURT OF APPEALS IN LIGHT OF MCL 769.34(11).....	9-13
IV THE STANDARD OF APPELLATE REVIEW FOR THIS COURT.....	14-16
V THE STANDARD OF APPELLATE REVIEW FOR THIS COURT.....	17-19
RELIEF.....	20

INDEX OF AUTHORITIES

<u>Koon v United States</u> , 518 US 81, 91, 116 S Ct 2035; 135 L Ed 2d 392 (1996).....	14
<u>People v Babcock</u> , 244 Mich App 64; 624 NW2d 479 (2000)(Babcock I).....	5-10
<u>People v Coles</u> , 417 Mich 523; 339 NW2d 440 (1983).....	5,15
<u>People v Fields</u> , 448 Mich 58, 78; 528 NW2d 176 (1995).....	9,10
<u>People v Hegwood</u> , 465 Mich 432; 636 NW2d 127 (2001).....	3-11
<u>People v Melbourne</u> , 535 Mich 630; 461 NW2d 1 (1990).....	14
<u>People v Snow</u> , 386 Mich 586; 194 NW2d 314 (1972).....	5
<u>Spaulding v Spaulding</u> , 335 Mich 382, 384-385; 94 NW2d 810 (1959).....	11
<u>State v Favela</u> , 259 Kan 215, 218; 911 P2d 792 (1996).....	12
<u>State v Johnson</u> , 124 Wn 2d 57, 65, 66; 873 P2d 514 (1994).....	12
MCL 733.7401 (4).....	5
MCL 769.34 (3).....	5,17
MCL 769.34 (11).....	9,14
MCR 2.613 (C).....	11
MCR 7.302 (B).....	15,16
USSG 5K2.0.....	13

STATEMENT OF JURISDICTION

Defendant-Appellee was convicted on a plea of guilty in the Circuit Court for Jackson County in September 23, 1999. After appeal by the Prosecuting Attorney the case was remanded for resentencing by a published Court of Appeals opinion dated December 26, 2000. 244 Mich App 64, 624 NW2d 479 (2000). The Prosecutor did not appeal that opinion.

Resentencing took place on June 28, 2001. Again the Prosecutor obtained leave to appeal and the Court of Appeals affirmed by an opinion dated March 19, 2002. 250 Mich App 463; 648 NW2d 221 (2002). Leave to Appeal sought by the Prosecuting Attorney was granted by the Supreme Court on September 16, 2002.

STATEMENT OF QUESTION PRESENTED

- I. WAS DEPARTURE FROM STATUTORY SENTENCING GUIDELINES IN THIS CASE SUPPORTED BY AN OBJECTIVE AND VERIFIABLE, SUBSTANTIAL AND COMPELLING REASON STATED ON THE RECORD?**

The Court of Appeals answered “Yes”

Defendant-Appellee answers “Yes”

COUNTER-STATEMENT OF FACTS

Appellee accepts the Appellant's Statement of Facts but adds the following facts either not included or inadequately included in Appellant's Statement.

In this case, the Prosecutor and the Defense Attorney entered into a plea bargain by which the Defendant pled guilty on September 23, 1999, to two counts of second degree criminal sexual conduct, MCL 750.520c (1)(a), and the Prosecutor dismissed the single original charge of first degree criminal sexual conduct, MCL 750.520b. The purpose of the plea bargain was to give the sentencing judge the opportunity to depart from the guidelines and consider a probationary sentence. The added count actually increased the guidelines. 9b, 10b*

The Court did place the Defendant on probation. The sentence was to three years probation, with the first year to be served in jail, but all but sixty days were suspended during good behavior. The Prosecutor was dissatisfied with the results of the plea bargain and appealed on the basis that the Sentencing Court had stated insufficient reasons for departure from the guidelines. The Court of Appeals, in a published opinion, decided that the Trial Court did not articulate a sufficient reason for the downward departure. The sentence was reversed and the case was remanded for sentencing. 244 Mich App 64; 624 NW2d 479 (2000). 43a-58a

*Reference to documents in the appendices will be noted in this fashion.

In remanding for resentencing, the Court of Appeals stated the law of the case on resentencing as follows:

Accordingly, we hold that, once this Court determines as a matter of law that the trial court's stated factor for departure was objective and verifiable, our review is limited to whether the trial court abused its discretion in concluding that the factor constituted a substantial and compelling reason to depart. If we conclude that a substantial and compelling reason exists, the defendant's sentence must be affirmed as long as the sentence otherwise comports with the statute and other requirements of law. Const. 1963, art. 4, §45; MCL 769.1(1); MSA 28.1072(1). We find no authorization in the statute for this Court to further review the overall sentence under Milbourn principle of proportionality. 49a

The Prosecutor did not apply for Appeal to the Supreme Court.

Resentence took place on June 28, 2001. At that time the Updated Presentence Report included the following statements by the Presentence Investigator, the senior probation officer in the county with extensive experience in matters of sex deviation:

Mr. Babcock has been under the supervision of the Jackson County Probation Department since last before the Court (11-4-99). During that time period he has taken advantage of the opportunity afforded him and has fully complied with the Michigan Sex Offender Registration Act, HIV testing and reported as instructed to the Probation Department. Gerald has paid \$200.00 on the financial obligation in this matter. He began sex offender treatment prior to sentencing at the suggestion of the Probation Department. That treatment has been ongoing, on a weekly basis, and therapist Senta Rose, Dove Counseling, is in the process of preparing an in depth review/assessment for the Court which will be made available prior to sentencing. When his health permitted, the respondent has been employed while on probation. He suffers from serious health issues which have interfered with his ability to earn a living over the last several months....61a

By all accounts, including that of the victim, the primary perpetrator of the victim Amanda Clute was Lyle Clute. His victimization was far more extensive and covered a greater period of time than that of Mr. Babcock. However, since Babcock plea to multiple counts, the Sentencing Guidelines will treat him more severely than Mr. Clute....62a

Gerald has fully complied and by all indication greatly reduced his threat of reoffending. After the passage of 18 months from the original sentencing in this case, we see little to be gained at this juncture in sentencing Mr. Babcock to the prescribed prison sentence which would be consistent with the Sentencing Guidelines. In the opinion of the Writer we now have mitigating factors in this

case that were not present in November of 1999. This is not to diminish the seriousness of his conduct, but it does seem that his behavior prior to the upcoming sentencing should be on some consideration. These factors are, we feel, verifiable based on the documentation attached to this report and the observations of his probation officer. Mr. Babcock has shown that he is amenable to treatment, treatment is clearly available and we feel the Court was correct in November 1999 when it was stated that Mr. Babcock could be better treated on the outside. To send him to prison for the prescribed term at this point will of course destroy any continuity in the present treatment program and may be counterproductive to his rehabilitation. In our opinion, it is treatment that will keep Mr. Babcock from reoffending over the long term, not incarceration. He has gone 18 months without reoffending and we would attribute that success to his participation in weekly, meaningful, sex offender treatment. 62a-63a

At this resentencing, the Court expressed several reasons for downward departure not noted in the earlier sentence, three of which the prosecutor in his brief in the Court of Appeals conceded are objective and verifiable.

The sentence was again three years probation, beginning at the date of the resentencing, the first year in jail, all but sixty days suspended and credit given for jail time already served.

The Presentence Report, at page 4, notes that the Defendant, who is of limited intelligence (90a), fully cooperated with police in the investigation and made a full disclosure to the Court upon entering his plea of guilt, when he admitted to touching the victim twice in the vagina or inner thigh. 62a

After the sentence in this case, the Michigan Supreme Court decided People v Hegwood, 465 Mich 432; 636 NW2d 127 (2001). On March 19, 2002, the Michigan Court of Appeals affirmed the Babcock sentence in a published opinion now being appealed.

INTRODUCTION

It is significant that the Appellant in each of the cases which are to be argued together on the question of legislative sentencing guidelines states the question as one of sentence length. That question is not one of the four specific issues to be briefed under the order of the Supreme Court granting Leave to Appeal.

This brief will consider each of the four issues in order, then specifically consider the sentence of Gerald Babcock. In summary, however, it is submitted that by any standard it would be contrary to the basic principals of the American Criminal Justice System and simply wrong to terminate the present effective supervised probation and therapy and long term rehabilitation of this Defendant in favor of confinement among hardened offenders with inadequate facilities for treatment and counseling.

I

WHETHER THE JACKSON CIRCUIT COURT SATISFIED THE “SUBSTANTIAL AND COMPELLING REASON” REQUIREMENT OF MCL 769.34 (3)

Unlike the controlled substance statute which provides for deviation or departure based on substantial and compelling reasons, the 1998 sentencing guideline statute provides for departure based on a substantial and compelling reason. MCL 769.34 (3) See, for comparison, MCL 333.7401 (4).

The Court of Appeals found that there are factors relied upon by the trial court in the second sentencing, which is now at issue, which were objective and verifiable:

“Those factors included defendant’s compliance with his probation requirements, including sex offender therapy, defendant’s herniated disc, and the fact that defendant is involved in providing care to his impaired brother. The prosecutor does not challenge the existence of these facts. Additionally, these factors constitute nondiscriminatory reasons not considered by the guidelines. MCR 769.34(3)(a) and (b).” *People v Babcock*, 250 Mich App 471 (99a).

Since the decision of this Court in *People v Snow*, 386 Mich 586, 194 NW2d 314 (1972), followed by *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983), many if not most Michigan Circuit Judges have begun their sentencing statements with reference, in one form or another, to the four considerations noted at 386 Mich 592 and 417 Mich 550:

- (a) The reformation of the offender,
- (b) Protection of society,
- (c) The disciplining of the wrongdoer, and
- (d) The deterrence of others from committing like offenses.

The Trial Judge in this case, like other sentencing judges, repeated the sentencing considerations, although in a different order. both in the original sentencing and the resentencing. 37a (page 7, lines 17-22), 88a

He then constructed a sentence to fit that criteria, in substance restating the terms of the original probation extended to three years from the date of resentencing. 90a The straight jail term without work release or any other concession was disciplining , but more than that, it was intended to rehabilitate: "...so that you understand fully what you have done and you have some time to think about it." 38a Sex offender treatment was required after jail time and the Defendant complied. 61a

No contact with young girls was intended to protect society. Fines and costs punished, but more than that, payment for Amanda's counseling was intended to at least partially compensate the victim. It should be noted that the main cause of Amanda's problem was obviously the more than 20 statutory rapes by her uncle, Lyle Clute, including rape in the classic sense. 36a (Page 4, lines 19-25)

Sex offender registration combined with other sentence terms would deter others, punish, and protect society. And finally, the assigned probation agent, Mr. Munger, would be the agent who normally supervises sex offender cases in Jackson Courts in order to achieve the purposes of sexual conduct sentencing. 38a

It is respectfully submitted that it is illogical to suggest that compliance for eighteen months or more with a sentence which clearly achieves the goals of sentencing, including rehabilitation, is not substantial reason sufficiently compelling to support continuation of that rehabilitation process.

American jurisprudence does not accept the "eye for an eye" concept of criminal justice. Instead, if rehabilitation of offenders can be accomplished, that option, particularly for first offenders, is commonly attempted. Probation can be revoked and a prison sentence determined in the event of probation violation.

The Appellant in this case has consistently, both in the Court of Appeals and in this Court, attempted to argue around the objective facts verified by the Probation Office, that is, that for a period of eighteen months Gerald Babcock fully complied with the Order of Probation, avoided further police contact, complied with sex offender registration and HIV testing, reported as instructed to by the Probation Department and, as suggested by the Probation Department, began sex offender treatment on a weekly basis. (61a) These facts are conceded by the Appellant at page 15 of his brief to be objective and verifiable.

It should be noted that at the second sentencing the probationary period for Gerald Babcock was actually extended, because the three year probation was to begin at the time of that sentence without credit for the eighteen months already served on probation.

In addition to verification, the comment of the Probation Officer, a specialist in this kind of case, should be considered on the issue of a substantial and compelling consideration:

“In our opinion, it is treatment that will keep Mr. Babcock from re-offending over the long term, not incarceration. He has gone 18 months without re-offending and we would attribute his success to his participation in weekly, meaningful, sex offender treatment.” 63a

That is not an objective statement, but no one says it is. It is a consideration, however, in determining whether the present successful rehabilitative probation is to be considered substantial and is clearly a compelling reason to continue rehabilitation.

The additional objective and verifiable reasons identified by the Court of Appeals are also substantial and compelling.

The health problem, summarized by the Court of Appeals as a herniated disc, is far more than that. The updated presentence report indicates:

“The defendant suffers from a respiratory condition and is under a doctors care. Mr. Babcock reports having to take Albuteral twice daily, Claratin once a day, uses a nasal inhaler and a Nebulizer machine. He also suffers from a serious back problem in that the L-4, L-4/5 and S-1 vertebrae have herniated disks and the L-5 has a degenerative disease. He has been in physical therapy for many months and is now facing a surgery recommendation from his physician. According to Gerald, the outcome of that procedure could be partial paralysis based on the prognosis coming from his doctor.” 66a

Despite his pain, Gerald Babcock has become the caretaker for his severely handicapped brother and his elderly mother. Documentation attached to the presentence report indicates that his mother has many health problems which limit her ability to care for brother Richard. Eighty-seven year old Grandmother Arlene cannot do so, and Gerald, known as Jay, provides hands on care, bathing, tube feeding and medication. There is no one else who can drive Richard to his medical appointments, including regular thirty mile trips to Ann Arbor. 68a

The Trial Court has referred to the various documents which support these considerations. It is submitted that any one of them would be sufficient to support the Trial Judge’s decision to depart from the guidelines.

II

WHETHER THE JACKSON CIRCUIT COURT SATISFIED THE “STATES ON THE RECORD” REQUIREMENT OF MCL 769.34 (3)

The Appellant does not contest this issue. See footnote 2 on page 4 of Appellant’s Brief. The trial court not only stated reasons for departure but indicated the basis for each reason subsequently identified by the Court of Appeals.

III

THE STANDARD OF APPELLATE REVIEW FOR THE COURT OF APPEALS IN LIGHT OF MCL 769.34 (11)

Both Appellant’s Brief in this case and that of Ntuku Aliakbar begin with the three part standard of review established by People v Fields, 448 Mich 58, 78; 528 NW2d 176 (1995), and People v Babcock, 244 Mich App 64; 624 NW2d 479 (2000)(Babcock I).

The second Babcock decision of the Court of Appeals, Babcock II, adopted that standard or standards based on the law of the case doctrine but questioned it with respect to the abuse of discretion standard for “substantial and compelling” in light of MCL 769.34(11). That section is as follows:

If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

Again, it should be noted that the word reason is singular. Further, however, this language does not speak to a standard of review, but only that the review is to be by the Court of Appeals.

Even more to the point, the language indicates that there is to be a review of the record, not merely consideration of the specific reasons for departure.

There is no basis for assuming that the legislature, in providing for review by the Court of Appeals, was establishing a new standard of review. The statute provides for the appropriate disposition upon a finding that the Trial Court did not have a substantial and compelling reason for departure, and that is all it does. For that reason, there is no basis to interpret into the statute something which is not there, that is, a change in the standard of review established in People v Fields, 448 Mich 58, 528 NW2d 176 (1995).

...the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. Fields, 448 Mich 77-78 (Citations omitted)

There is one aspect of Fields, however, which is distinguished by the language of the present statute. That case suggested that where there are proper and improper reasons given for deviation, the case would be remanded to determine if the decision that some were improper would affect the sentence. 448 Mich 80. That decision was based on a statute which called for multiple reasons. As noted, the present statute indicates that one reason is enough. Further, it is clear from the record that the trial judge would give the same sentence based any one of the three reasons, particularly the first.

Abuse of discretion is defined by Spaulding v Spaulding, 335 Mich 382, 384-385; 94 NW2d 810 (1959)

The term discretion itself involves the idea of choice, of an exercise of will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgement but defiance thereof, not the exercise of reason but rather of passion or bias.

The legislature is presumed to be aware of existing judicial policies and interpretations. If there was to be a change, the legislature would have said so, as they did in the matter of the requirement of only a single reason for departure. That the Court of Appeals reviews for substantial and compelling reasons is not a change.

The most difficult decision a Trial Judge can make is not guilt or innocence but sentencing. Guidelines help, but they cannot take into consideration every applicable consideration, which is the reason for allowing deviation or departure.

Sentencing to some extent involves credibility. That determination involves observation of witnesses to determine the facts upon which sentencing decisions are made. MCR 2.613 (C), illustrates that concept:

(C) Review of Findings by Trial Court. Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

This Court has already noted a standard of review for the extent of departure. People v Hegwood, 465 Mich 432, 437n10; 636 NW2d 127 (2001) partially modified Babcock I and indicated that the “substantial and compelling” circumstance is considered to support the particular departure in a case.

It is submitted that the Court of Appeals standard of review is the three part test of Fields, with departure length to be based on the substantial and compelling circumstance (or circumstances) upon which departure is based. If any other standard is used, it should give substantial weight to the considerations stated on the record by the Sentencing Judge, based upon his observation of the parties involved and the documentation provided to him for purposes of sentencing.

In response, the Appellant cites cases from three other states. The statutes upon which those cases are based, however, are not the same as the Michigan statute. The comparison is the proverbial apples to oranges.

The Kansas and Oregon statutes require plural substantial and compelling reasons for departure. (Page 8, Appellant's Brief). The Washington statute does not use that concept at all but refers to an "aggravated exceptional sentence," and includes a non exclusive list of factors to be considered. State v Johnson, 124 Wn 2d 57, 65, 66; 873 P2d 514 (1994).

The case cited make the differences even more clear. The Kansas and Oregon statutes include two different kinds of departures, directional and dispositional. Separate rules apply to each, including legislative adoption of the principle of proportionality "...to the severity of the crime of conviction and the offender's criminal history" in one instance and to only to the severity of the crime of conviction in the others. State v Favela, 259 Kan 215, 218; 911 P2d 792 (1996).

It should be noted that Favela involved a downward departure reversed by the Court of Appeals which was subsequently reversed by the Kansas Supreme Court to reinstate the downward departure determined by the trial court.

The Kansas statute and the Oregon statute include non exclusive aggravating and mitigating factors which may be considered for departure. Michigan has no such list.

Appellant also refers to cases under the Federal guidelines statute and manual. Again, the guideline scheme is totally different from that in Michigan, including factors considered for specific offenses, but there is concept included which can be considered. The Michigan legislature could have adopted a similar pattern for its guidelines but chose not to do so.

In Koon v United States, 518 US 81, 91, 116 S Ct 2035; 135 L Ed 2d 392 (1996), the United States Supreme Court clearly indicated that appellate review of sentencing departures was to be based on the abuse of discretion standard. Review by a panel of the Ninth Circuit which used a different standard was reversed. The Court held, in part, at 518 US 98, that trial courts have an advantage over appellate courts in making departure decisions, especially as they see many more guideline cases than appellate courts. (See also Federal Guideline Manual commentary to 5K2.0.)

In brief, the Michigan statute is unlike the other statutes referred to, and unlike other sentencing statutes such as that of Minnesota, and should be considered as the basis of Michigan law and precedent, which the legislature is presumed to know. As pointed out in Babcock I, if the legislature chose to change the Fields three part standard of proof, they would have clearly done so.

IV

THE STANDARD OF APPELLATE REVIEW FOR THIS COURT

Appellant assumes that the review standard of the Supreme Court should be the same as that of the Court of Appeals. That should not be assumed.

Before People v Coles, 417 Mich 523; 339 NW2d 440 (1983), appellate review of sentencing usually was limited to consideration of due process or cruel and unusual punishment. Coles noted that the Snow criteria for determining an appropriate sentence indicated that the sentencing judge should articulate his reasons for the sentence on the record and established a standard of review later modified by People v Melbourn, 535 Mich 630; 461 NW2d 1 (1990). In Babcock I, the Court of Appeals questioned the continued applicability of Milbourn's proportionality standard in view of the new legislative guidelines.

An earlier portion of this brief discussed the three part review standards of People v Fields, 448 Mich 58; 528 NW2d 176 (1975). Babcock I applied that standard, or more specifically, applied the abuse of discretion standard to the question of a substantial and compelling reason. Babcock II accepted that standard on the basis of the law of the case doctrine but questioned whether it should be applied in view of the language of MCL 769.34 (11).

The statutory subsection is again repeated here.

If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

It should be noted that the statute mentions only the Court of Appeals and not the Supreme Court. Assuming that the legislature intended to establish a standard or standards of review, it is significant that only the Court of Appeals is mentioned. The language clearly leaves the Supreme Court to establish its own standard of review if it wishes to do so.

Michigan Court Rules already add considerations for granting Applications for Leave to Appeal. MCR 7.302(B). In a sense, the Court Rules establish additional standards of review. One of them, MCR 7.302 (B)(5), is particularly on point:

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; ...

In the process of review, it is suggested that deference should be given to not only the Trial Judges decision based on the whole record and the observation of both the Defendant and, if the opportunity is exercised, the victim in open court. The Court also should give some deference to the deliberative decisions of the Court of Appeals, which will consider far more departure questions than the Supreme Court. The rationale of the United States Supreme Court in the Koons case mentioned earlier is very much on point here.

For those reasons, it is respectfully submitted that the Michigan Supreme Court should adopt a clear error standard of review, determining that the decision of the Court of Appeals in matters of sentencing will not be reversed except for clear error. This standard is consistent with the history of sentence appeals in the State of Michigan and with the language of the legislature which appears to suggest that the determination of

sufficiency of the substantial and compelling reason question can be made by the Court of Appeals.

Suggestion of a different standard is not intended to in any way diminish the authority of the Supreme Court. Instead, it will discourage frivolous Applications for Leave to Appeal and permit better utilization by the Supreme Court of available resources for cases that are clearly provided for by MCR 7.302(B).

THE SENTENCE OF GERALD BABCOCK

The difficult problem in this case may be to conform reality with theory. Perhaps that is why the case was chosen for consideration.

This brief has noted, perhaps redundantly, that it would be a senseless act to interrupt the effective rehabilitative probation of Gerald Babcock in favor of prison warehousing. This is a fact by any standard of review.

The Court of Appeals correctly applied the Field standards and there is no reason to reverse that decision, regardless of whether or not this Court adopts the clear error standard suggested in the Court Rules or simply affirms the reasoning of the Court of Appeals. If the Milbourn proportionality standard is reinstated, the sentence is proportional to the offense and the offender.

The sentence is particularly appropriate in view of the footnote in Hegwood. This “particular departure”, that is, continuation of effective probation, is clearly what should be the result of the reasons for the departure.

In using this case to set standards, the Supreme Court cannot reverse the numerous decisions of the Court of Appeals based upon Babcock I. For that reason, any decision of this Court should be prospective only. Further, for reasons stated earlier, the Court should give substantial deference to the earlier decisions of both the trial court and the Court of Appeals.

The legislature did not list specific reasons for departure or state that reasons should be considered in a vacuum. Instead, MCL 769.34(3) directed a “review of the

record.” That is the import of this section of the statute, not that the legislature was suggesting a standard of review.

Review of this record will clearly indicate that the veteran trial judge considered everything before him. In the second sentencing he found objective and verifiable, substantial and compelling reasons in the context of the entire record to choose the sentence he gave.

Perhaps if the Prosecutor had appealed to this court from Babcock I the situation would be different. To suggest a different standard of review now is simply too late for fair application to Gerald Babcock within the philosophy of the criminal justice system.

Review of the entire record includes review of the original plea bargain, in which a veteran trial attorney accepted an increased guideline exposure for the possibility of probation (not available for Criminal Sexual Conduct in the first degree), the recommendations of the Probation Officer, and all other considerations which may not be objective or substantial and compelling reasons but are involved and included in the record.

Review involves all of the documentation which supports both Defendant’s successful probation adjustment, his physical problems and the fact that incarceration now would terminate not only his rehabilitation but punish the family members who rely upon him for daily care.

Appellant has speculated that there may be other solutions, but there is absolutely nothing on the record to support his speculations!

Taken together, documents in the record create a substantial and compelling case for the continuation of probation. The comments of the Judge at sentencing indicate not

only that he considered those documents but in fact listened to and considered the comments of members of the family of the Defendant and the family of the victim on the record at the time of sentencing. 88a-91a

If the Supreme Court adopts the clear error standard, or in fact any other standard, consideration should be given to the fact that the Court of Appeals in Babcock II was bound by MCR 7.215(I)(1) and the rule of the case doctrine to follow the abuse of discretion standard of Babcock I. That the Prosecutor did not appeal Babcock I is also a part of the record now before the Court. This Court is not bound by the rule of the case doctrine, but it is a part of the record.

The decision of the Court of Appeals was not clear error and was based on the Fields standards in effect at that time. Simply stated, a review of this entire record supports the finding that one and in fact all of the objective and verifiable reasons for departure identified by the Court of Appeals are substantial and compelling.

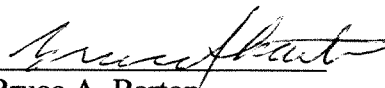
Appellant concedes that the extent of deviation is to be reviewed for abuse of discretion. For that reason, his statement of the question and his answer are incorrect. Review of this entire record supports the sentence of the trial court and the decision of the Court of Appeals.

RELIEF

For the reasons stated, the opinion of the Court of Appeals should be affirmed.

Dated: December 5, 2002

Respectfully Submitted,


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